

1 it, where is the evidence? You have all the VEC's that
2 he dealt with. Have they testified? Are they prepared
3 to testify that he asked for the tests?

4 MR. MALINEN: We do have, in effect, chain of
5 custody arguments with regard to the tests, but we
6 don't have another conversation of this sort, a smoking
7 gun, if you will, during the time frame in question.
8 This occurred a month after.

9 JUDGE CHACHKIN: But, you know all the
10 individuals who he dealt with who he could have gotten
11 the tests from. Are any of them prepared to testify,
12 as Mr. Georgias is, that he asked them for the
13 results -- that he asked them for the tests?

14 MR. LYON: Your Honor, I can respond to that.
15 They all sent the Bureau letters saying that there was
16 no cheating at those sessions. The Bureau ignored them
17 and went with an informant who had been prepped by
18 people who have malice against Mr. --

19 JUDGE CHACHKIN: I don't understand -- you
20 know who the individuals were, who he dealt with, and
21 if they all deny that he cheated, that he asked for the
22 tests prior to the time he administered these tests,
23 how, by putting on some telephone conversation that
24 occurred after the fact, this is going to establish
25 that he cheated in connection with the tests that were

1 administered when we could have direct evidence?

2 If all these individuals deny that is a fact,
3 where is there any kind of chain of -- any kind of
4 duplicative conduct or anything? I don't understand
5 how you're going to prove it.

6 MR. FITZGIBBON: Your Honor, I think we'd
7 like another opportunity to discuss this at the
8 admissions session. We weren't really prepared to
9 discuss the admission of --

10 JUDGE CHACHKIN: All right. I'm indicating,
11 based on what I've heard this morning, I don't see how
12 Mr. Georgias' testimony is relevant to the issues in
13 this case, frankly.

14 MR. MALINEN: As a follow up, we are not
15 conceding that the VE's who have submitted affidavits -
16 - I'm not certain that everyone has in
17 Mr. Lyon's case-in-chief but, assuming they have, we're
18 not assuming the credibility of all their affidavits in
19 any event.

20 JUDGE CHACHKIN: Well, you may not be
21 assuming it, but you don't have any evidence of any
22 wrongdoing by Mr. Pascal in that regard.

23 MR. MALINEN: Well, again, we don't have the
24 smoking gun type of conversation, that's true.

25 JUDGE CHACHKIN: You can call it a smoking

1 gun, but the fact of the matter is you don't have any
2 evidence from any of these individuals indicating that
3 he did something wrong prior to the time he
4 administered the tests. So, the issues concern what
5 took place during these tests, and that's what you have
6 to deal with.

7 You've decided, for whatever reason, or you
8 couldn't find any evidence that he engaged in conduct
9 which Mr. Georgias claims he engaged in. All right.

10 As far as Mr. Georgias, I'll certainly be
11 prepared to listen to the Bureau but, from what I've
12 heard this morning, I have my doubts whether his
13 testimony is relevant.

14 Now, Mr. Ramsey, where does he fit into this
15 picture?

16 MR. LYON: Mr. Ramsey apparently is a person
17 the Bureau is proffering as an expert witness on
18 teaching and -- I have to admit to being a little
19 confused as exactly what he's doing but, apparently,
20 Mr. Ramsey reviewed the notes of Ms. McElwaine and came
21 to some conclusion based on her notes as to the extent
22 of the subject matter that Mr. Pascal covered during
23 his classes and, apparently, that's designed to bolster
24 the Bureau's inference that Mr. Pascal only taught that
25 which was going to be on the test.

1 I readily admit that I think that's sort of a
2 house that Jack built approach and, to the extent that
3 Mr. Ramsey's testimony is admitted, I think I need to
4 cross examine him.

5 MR. FITZGIBBON: We don't oppose.

6 JUDGE CHACHKIN: You don't oppose Mr. Ramsey?

7 MR. FITZGIBBON: No.

8 JUDGE CHACHKIN: You're going to bring him?

9 MR. FITZGIBBON: Yes.

10 JUDGE CHACHKIN: Oh, then there's no problem.
11 We don't have to concern ourselves with it.

12 So, the only individual we're concerned with
13 is Mr. Georgias, and I have told you what my ruling
14 would be with respect to Mr. Maia as rebuttal.

15 Let's talk -- I guess now we should turn to
16 your witnesses, who the Bureau wants for cross
17 examination.

18 MR. LYON: Yes. I have no objection to
19 Mr. Pascal and Ms. Crane testifying. The only other
20 witness that the Bureau requested was Mr. Fakehany, and
21 I have no objection to their suggestion that he testify
22 by speakerphone.

23 I would note again, or as Mr. Fitzgibbon
24 raised earlier in the morning, that I did tender four
25 declarations yesterday. They're very short

1 declarations. Certainly, to the extent the Bureau
2 needs time to review them to determine what they want
3 to do with respect to it, I certainly think they should
4 have it.

5 I will readily admit that these declarations
6 were prompted by certain statements that appeared in
7 the Bureau's rebuttal case and, to a certain extent, I
8 have to admit that these are submitted in the nature of
9 a request to rebut the Bureau's rebuttal case.

10 I realize the procedures don't initially call
11 for that, Your Honor, but Your Honor, you also have
12 discretion to call for testimony, so that the record
13 will be complete on these matters.

14 Mr. Ferrante has tendered two declarations,
15 and that may seem sort of strange, and I want to state
16 on the record that Mr. Ferrante is a somewhat reluctant
17 witness because he believes that he may be subject to
18 reprisals by Mr. Morse and Mr. Fare, who was the
19 initial complainant here.

20 So, if it appears that Mr. Ferrante has been
21 somewhat reluctant in giving me his testimony, that's
22 why, Your Honor.

23 With respect to Mr. Quinn, the testimony that
24 Mr. Quinn and that Mr. Ferrante have given in respect
25 to the August 4 session deals with the question of the

1 Morse Code examination.

2 Mr. Pascal testified that he made a statement
3 just before he sent the Morse Code examination on the
4 4th of August. Now, with respect to that Morse Code
5 examination, Mr. Pascal does not dispute that there was
6 a violation of the rules with respect to the conduct of
7 that examination.

8 It's unfortunate, but I think we will show
9 that doesn't show that Mr. Pascal lacks the requisite
10 qualifications to be a licensee.

11 The key dispute, however, with respect to
12 that Morse Code examination appears to be whether
13 Mr. Pascal made a statement right before the Morse Code
14 examination or he made it at lunchtime when he was
15 teaching a sample code class, and the key to this, if I
16 can anticipate the Bureau's argument, is that if
17 Mr. Pascal made this statement during lunch when he was
18 teaching the sample code class or an abbreviated code
19 class, it would indicate an intent to violate the
20 rules.

21 Whereas, my position is, if he made the
22 statement right before he gave the examination, it was
23 an unfortunate and negligent and stupid statement, but
24 it doesn't indicate that he had an intent to do
25 anything fraudulent.

1 JUDGE CHACHKIN: Well, the Bureau apparently
2 hasn't had a chance to look at this Respondent
3 submission to determine whether or not they want any of
4 these witnesses for cross examination; is that correct?

5 MR. FITZGIBBON: That's correct, Your Honor.

6 JUDGE CHACHKIN: So, I'll wait until
7 Wednesday and hear what the Bureau has to say about it.

8 MR. FITZGIBBON: But the Bureau would object
9 to these late declarations. The procedural schedule
10 doesn't provide for any rebuttal to the rebuttal case.

11 MR. LYON: Your Honor, I can't dispute his
12 statement, but I would note that this is a revocation
13 proceeding. The licenses of the Respondents are at
14 issue. I don't think that there's been any prejudice
15 to the Bureau, and I think, in the interest in justice
16 and achieving a fair result and a fair hearing, that --
17 and given the absence of prejudice, that I think you
18 should exercise your discretion to allow these
19 declarations into evidence.

20 JUDGE CHACHKIN: Does the Bureau intend to
21 offer witnesses which dispute these declarations?

22 MR. FITZGIBBON: Well, we haven't fully
23 analyzed these declarations. Two of them dispute
24 Christine McElwaine's affidavit or her rebuttal
25 affidavit. So, that's already in dispute.

1 JUDGE CHACHKIN: Well, I'll hear the Bureau's
2 arguments on Wednesday. I recognize that the procedure
3 which the parties adopted and stipulated to is rather
4 unorthodox. In a sense, in a normal revocation
5 proceeding, it's only the Bureau who has the burden of
6 proceeding and proof on the issues and, normally, what
7 follows, if the Bureau presented their direct case, the
8 parties would put in their rebuttal, and then you'd
9 have to make a decision whether or not to allow further
10 evidence.

11 Here we have a peculiar situation where the
12 Bureau, although they are putting in a direct case and
13 the Respondent has put in a direct case, which of
14 course they can do so. They're not required to. It's
15 really more a rebuttal case, and the Bureau is putting
16 in a rebuttal case which may be appropriate in a Common
17 Carrier case where you have licenses involved, but it's
18 certainly an unusual procedure in a revocation
19 proceeding.

20 So, I don't know if that will affect -- in
21 other words, what the Bureau should have done is put in
22 an entirely direct case, and then they put in a
23 rebuttal case, and then I have to make a decision
24 whether I should allow in other evidence or not from
25 either of the parties.

1 We have the unusual case where the Bureau is
2 opening and then putting in a rebuttal case.

3 MR. FITZGIBBON: I would note that the Bureau
4 was a very effective negotiator with respect to the
5 procedures.

6 JUDGE CHACHKIN: So, I would be more
7 concerned -- as long as the Bureau has been put on
8 notice, I would be more concerned as to the substance
9 of matters here, since I would like to have a complete
10 record of what occurred, and I'd like to hear from all
11 the witnesses who have relevant testimony.

12 But if the Bureau has any objections to such
13 testimony and wants to cross examine these witnesses or
14 has other objections, we'll just have to wait until
15 Wednesday to find what the objections are.

16 MR. FITZGIBBON: My one problem is that
17 Wednesday is only six days before the hearing, and I
18 think we need at least a week's lead time to arrange
19 transportation.

20 JUDGE CHACHKIN: Well, the only one we're
21 talking about is McElwaine.

22 MR. FITZGIBBON: Well, I wasn't talking about
23 her. I was referring --

24 JUDGE CHACHKIN: As the respondent is
25 concerned? Well, as I indicated to you, or are you

1 talking about your own case? I'm confused now.

2 MR. FITZGIBBON: No, what I'm saying is that
3 Wednesday will only be six days before the hearing and
4 we need a week lead time to arrange transportation if
5 we decide to cross-examine any of these witnesses.

6 JUDGE CHACHKIN: Well, in other words, are
7 you concerned about Mr. Lyon being able to bring the
8 witnesses in a shorter period of time? I just
9 understand what your concern is.

10 MR. FITZGIBBON: Oh, okay.

11 JUDGE CHACHKIN: As far as your own witness
12 is concerned --

13 MR. FITZGIBBON: Yes. Okay. Yes. That's
14 correct. He would have to bring or --

15 JUDGE CHACHKIN: Or we'll have to deal with a
16 speaker phone. You've indicated you're prepared to
17 cross-examine any of their witnesses by speaker phone.

18 MR. FITZGIBBON: That's right.

19 JUDGE CHACHKIN: Now, maybe you could change
20 your mind now.

21 MR. FITZGIBBON: Although that offer was
22 dependent on an overall agreement on all the out of two
23 witnesses other than the three principals.

24 MR. LYON: No, that wasn't indicated, Your
25 Honor.

1 MR. FITZGIBBON: I think we would be -- I
2 think we probably would be willing to cross-examine
3 these new witnesses by speaker phone also. We haven't
4 decided that yet. But once we evaluate it, we probably
5 will come to the conclusion that they can be
6 cross-examined by speaker phone.

7 MR. LYON: You could, of course, support my
8 request that I may very well refile to move the hearing
9 to Los Angeles.

10 JUDGE CHACHKIN: Well, I don't see any basis
11 for moving the hearing to Los Angeles on the basis of
12 two or three witnesses. That's all we're dealing with
13 here.

14 MR. LYON: Well, Your Honor, I have indicated
15 that I wish to call as adverse witnesses Mr. Ordway and
16 Mr. Sfare who are Los Angeles residents.

17 JUDGE CHACHKIN: Well, you'll have Mr. Morse.
18 I don't know about those other two witnesses.

19 MR. FITZGIBBON: As I said, we'd be willing
20 to agree to a speaker phone on those two witnesses.

21 MR. LYON: For Ordway and for --

22 MR. FITZGIBBON: Sfare, yeah.

23 MR. LYON: I really would like to confront
24 them face to face. I'd have to think about it.

25 JUDGE CHACHKIN: All right. The parties can

1 let me know on Wednesday. If you want to move it up to
2 Tuesday, I have no problem with that.

3 MR. LYON: The sooner the better. As I said,
4 I'm willing to do it -- I'm prepared to do it today or
5 this afternoon.

6 JUDGE CHACHKIN: Well, the Bureau is entitled
7 to have some time too.

8 MR. FITZGIBBON: I want to say Wednesday is
9 fine with us.

10 MR. LYON: I'd be perfectly happy to do it
11 Monday, Tuesday, if you wish.

12 JUDGE CHACHKIN: If the Bureau -- it's up to
13 the Bureau when they'll be ready.

14 MR. MALINEN: Can we just have a quick
15 moment?

16 JUDGE CHACHKIN: Sure. We'll go off the
17 record.

18 (Off the record.)

19 JUDGE CHACHKIN: Back on the record. What is
20 your position?

21 MR. MALINEN: It's unchanged, Your Honor. We
22 would still suggest speaker phone for the two adverse
23 witnesses.

24 JUDGE CHACHKIN: All right. Well, you
25 recognize, Mr. Lyon, that it's your witnesses you're

1 going to have to arrange for the speaker phone.

2 MR. LYON: I understand if I decide to go
3 forward with their testimony by speaker phone, I'll do
4 it.

5 JUDGE CHACHKIN: All right.

6 MR. MALINEN: You're not agreeing to the
7 speaker phone at this time?

8 MR. LYON: I've got people I think are going
9 to lie to me and lie to this forum.

10 JUDGE CHACHKIN: Well, you may not want to
11 put them on altogether. I don't know. Maybe you're
12 satisfied with Mr. Morse. I don't know.

13 MR. LYON: It may very well be.

14 JUDGE CHACHKIN: Well, that will be up to
15 you.

16 MR. MALINEN: Just asking.

17 JUDGE CHACHKIN: But as far as these
18 declarations are concerned, if the Bureau let me know
19 on Wednesday whether they'd be -- or Tuesday, whether
20 they'd be agreeable to have them taken by speaker
21 phone. It would seem to me that if a man -- if all
22 we're dealing with is just one statement, his recall,
23 or when this conversation took place, I can't see any
24 reason to bring him to Washington to that for five
25 minutes.

1 But maybe the Bureau -- if one -- since we're
2 dealing here with individuals, apparently, which appear
3 to be disinterested, and I have reference to the
4 declarations here of these individuals here who seem to
5 be involved in this, maybe the Bureau would be
6 agreeable if, Mr. Lyon, you had no objection, with
7 respect to your rebuttal witnesses are concerned, with
8 the Bureau to call up these individuals and speak to
9 them and determine if they want to accept their
10 testimony without cross-examination.

11 Because we're talking here about apparently
12 the time when this conversation took place when
13 Mr. Pascal made this statement. But that's only -- I'm
14 just --

15 MR. LYON: Well, I, of course, have no
16 control. The Bureau has had contact with both of those
17 witnesses pursuant to the Bureau's investigation
18 previously. I have -- they're not my client so I have
19 no control over what the Bureau does in that respect.

20 JUDGE CHACHKIN: All right.

21 MR. FITZGIBBON: You're referring to
22 Mr. Sfare and --

23 JUDGE CHACHKIN: No. We're referring to
24 Mr. Ferrante and Mr. Quinn, I guess. That's who we're
25 referring to.

1 MR. LYON: Yeah. I believe Mr. Cumming --

2 JUDGE CHACHKIN: And I don't know about
3 Mr. Cumming.

4 MR. LYON: I believe Mr. Cumming may testify
5 with respect to that too. I just am not sure to tell
6 you the truth.

7 MR. FITZGIBBON: We have not had any
8 telephone contact with Mr. Quinn as far as I can
9 recall. And we had contact with Mr. Ferrante because
10 he called us.

11 JUDGE CHACHKIN: And Mr. Cumming you haven't
12 spoken with.

13 MR. FITZGIBBON: I can't recall speaking to
14 him. A number of people who are involved in these
15 sessions called up, but I can't recall speaking to
16 Mr. Cumming. I might have. But if I did, it was
17 because he called us.

18 MR. LYON: I think that many people have
19 communicated with Mr. Fitzgibbon and I'm sure that
20 Mr. Cumming, his wife, Valerie, have sent numerous
21 letters to Mr. Fitzgibbon and I don't know about
22 Mr. Cumming himself.

23 JUDGE CHACHKIN: Well, in any event, the
24 Bureau, if they wish, they could call up these
25 individuals and ask them about these declarations and

1 decide for themselves whether they want to -- if
2 there's a necessity for speaker phone cross-examination
3 or they could indicate to me on Wednesday or Tuesday,
4 whatever we decided, and whether they -- what their
5 response is. I'll leave it for the Bureau to decide
6 what course they want to follow.

7 All right. As far as Mr. Fakehany is
8 concerned, that's agreeable. That's a Bureau witness
9 or that --

10 MR. LYON: He's my witness.

11 JUDGE CHACHKIN: Your witness. The Bureau is
12 agreeable, speaker phone and everybody, and apparently
13 you have no objection -- Mr. Lyon, you will make him
14 available by speaker phone. The Bureau wants him for
15 cross-examination.

16 MR. LYON: Is there, in fact, a speaker phone
17 in this room or do we know what --

18 JUDGE CHACHKIN: Well, there are two rooms
19 now which have speaker phone facility availability now.
20 I think it's two and three, but I'm not sure.

21 MR. LYON: Okay. I will contact --

22 JUDGE CHACHKIN: It is two and three, yeah.

23 MR. LYON: I will contact Captain Fakehany
24 and arrange a time when he'll be available. As I
25 understand it, he doesn't need a speaker phone on his

1 end. We only need one here, is that right?

2 MR. FITZGIBBON: Right.

3 MR. LYON: I don't believe he'll be
4 represented by counsel. If he should be then I'll let
5 his counsel deal with arranging the speaker phone.

6 JUDGE CHACHKIN: All right. Well, we have to
7 arrange the speaker phone here and you have to deal
8 with the telephone company. And I would issue an order
9 indicating that testimony will be taken by speaker
10 phone at whatever the time as they agree to. Perhaps
11 by Tuesday you can give me the information,
12 Mr. Fitzgibbon.

13 MR. FITZGIBBON: Okay.

14 JUDGE CHACHKIN: And maybe you can talk to
15 the Bureau even prior to Tuesday as to other witnesses
16 who can be accommodated by speaker phone if the Bureau
17 wants them.

18 In any event, the parties are agreeable to
19 having a session on Tuesday rather than Wednesday; is
20 that -- or is Wednesday the better day?

21 MR. FITZGIBBON: I would prefer Wednesday.

22 JUDGE CHACHKIN: All right. Well, then we'll
23 leave it for next Wednesday then.

24 Is there anything else that we need to take
25 up this morning?

1 MR. FITZGIBBON: The objection to Christine
2 McElwaine's testimony.

3 JUDGE CHACHKIN: If you want to indicate to
4 me briefly your view on it. And then, of course, I'll
5 permit you to brief it and we'll take it up again on
6 Wednesday. Go ahead.

7 MR. MALINEN: Okay. For, if nothing else,
8 background purposes indicating the work we've done
9 since last night at about 4:30. I did have an
10 opportunity to read through Mr. Lyon's item here. And
11 maybe it would be quickest if I just run through these
12 arguments very quickly.

13 Our position is that Ms. McElwaine did act
14 legitimately under the auspices of the amateur
15 auxiliary and under Section 4 of the Communications
16 Act. We would say, alternatively, if she did not, and
17 if Mr. Lyon prevails on this notion, that nonetheless
18 the Bureau would be -- it would be acceptable for the
19 Bureau to use such evidence to the extent that it is
20 credible just as we would use any unsolicited letter
21 coming in that indicates legitimate credible
22 enforcement information.

23 Our primary argument, though, which we're not
24 conceding this point, is that her action does follow
25 under Section 4. I'll make four very quick points

1 here.

2 First of all, what we're talking about here
3 is under Section 4 of C, found at 47 U.S. Code 154.
4 The first point made by Mr. Lyon is that Chris did not
5 have adequate training. But to fall under this section
6 we would point out that -- this is all pretty much
7 statutory interpretation of mine -- we would point out
8 that the section cited here with regard to training
9 says, "Training sufficient to operate an amateur
10 station."

11 The Bureau's position is that Chris McElwaine
12 already being a general class amateur operator, general
13 being the middle of five classes. Five being the top.
14 Chris was in the middle, number three. The licenses at
15 issue here were lower class. So Chris was a three.
16 She had sufficient training since she could operate an
17 amateur.

18 And we believe the reason for that language
19 in section 4 is so that people who aid in enforcement
20 actions with regard to amateur service roles know
21 something about the amateur service. They have, in
22 fact, been through the program. She had training
23 sufficient for this narrow purpose and that was simply
24 to report back accurately what happened at the
25 sessions.

1 Our second position is that -- it focuses on
2 the word monitoring. I note that of the ten paragraphs
3 in this item by Mr. Lyon, seven of them focused on the
4 idea that the word monitoring is used in the section.
5 And that here Chris was not simply monitoring, as he
6 would say, interference problems, but rather doing
7 something else.

8 The Bureau's position is this word monitoring
9 goes beyond the monitoring for mere interference
10 complaints. And because Mr. Lyon cites legislative
11 history, we shall too on this point and this will just
12 take half a moment. Mr. Lyon cites the Senate report
13 underlying this act. This is the conference report
14 which has greater legislative history because when the
15 Senate report is tossed, substitute is made by both
16 houses and goes to the President. This is that report.

17 This report indicates -- and I'll make
18 photocopies for all concerned and I apologize for not
19 having done it yet, but we've done this with scratch
20 notes on the fly. It indicates in just a few short
21 paragraphs what this particular language was intended
22 to do and ends by saying, "The conference substitute"
23 that's this report, "and the bill that became law
24 should help conserve Commission resources, give
25 statutory approval to the use of amateur radio

1 volunteers who will complement the Commission's staff
2 in carrying out licensing and monitoring
3 responsibilities. The use of CB volunteers in
4 monitoring assignments should yield similar benefits."

5 We would hold that licensing and monitoring
6 is different than merely monitoring and here we're
7 looking at license revocation so it falls within the
8 act.

9 The third point here focuses on Mr. Lyon's
10 language on page four, where he says -- to make this
11 point clear I would refer you to page four about
12 halfway down the page. The provision goes on to state,
13 "Nothing in this clause," et cetera, "shall be
14 construed to grant" -- here when the language says
15 nothing shall be construed to grant individuals to
16 recruit and train, and in this subparagraph issues
17 sanctions to violators, "or to take any forceful
18 action."

19 We would argue that that means issuing
20 something like notice of apparent liability, some
21 formal action that is of a greater level of action than
22 say an advisory notice which is permitted; that is,
23 this clause does not apply here because it does not
24 proscribe actions which fall under this level of
25 enforcement action. It says that these volunteers may

1 not issue sanctions. They may not take other
2 enforcement actions. A lesser sort of action say
3 simply reporting back information is not proscribed by
4 this particular section.

5 And our last point, the fourth, is as for the
6 cooperative agreement between the FCC and the ARRL
7 which encompasses this amateur auxiliary scheme, we
8 would say that this is not a ground for denying the
9 status, the amateur auxiliary that is and the
10 operation. In this instance, Chris McElwaine is going
11 undercover. If both parties to this agreement, which
12 is not an FCC rule, concur on her actions and the
13 Communications Act is, in fact, not violated. This
14 last argument goes to Mr. Lyon's paragraphs nine and
15 ten.

16 JUDGE CHACHKIN: Nine and ten?

17 MR. MALINEN: Yes.

18 MR. LYON: Your Honor, if I may briefly
19 respond to some points --

20 JUDGE CHACHKIN: Well, there's one point you
21 haven't dealt with and that is the argument that the
22 tape should be suppressed under California law.

23 MR. MALINEN: I'm willing to argue that
24 straight away too, if you'd like to move on. It's a
25 separate idea.

1 JUDGE CHACHKIN: Well, you might as well.

2 MR. MALINEN: Sure. Certainly.

3 Mr. Fitzgibbon has a point here.

4 MR. FITZGIBBON: Okay. I wanted to point out
5 that one of the attachments to the respondent's
6 objection to Ms. McElwaine's testimony is a portion of
7 a deposition by David Morse. And it's rather strange
8 that this deposition has made its way to Washington and
9 been attached to this document because I just spoke to
10 Mr. Morse late yesterday afternoon and he had not even
11 received and signed off on the deposition itself.

12 MR. LYON: Excuse me, Mr. Fitzgibbon. You
13 were there. Are you disputing that he said what he
14 said. I mean, you were there by speaker phone.

15 MR. FITZGIBBON: We frankly haven't had time
16 to read the whole portion of the deposition. We only
17 got this at 4:30 yesterday afternoon. So I don't know
18 whether what it contains is accurate.

19 MR. LYON: All right. I'm just trying to
20 understand because I, you know, I apologize if he
21 hasn't gotten it or signed it. I'm surprised that he
22 hasn't. And I also apologize that you only got it at
23 4:30. I sent it over to you as soon as I could and I
24 specifically filed it and served it on you and the
25 Judge prior to close of business because I wanted you

1 to have it available and be prepared to argue it.

2 With respect to Mr. Morse's deposition,
3 though, I suggest that it's irrelevant that he hasn't
4 signed it yet unless you're suggesting to me that
5 somehow the court reporter made a mistake in
6 transcribing it or unless you're suggesting that it was
7 fabricated.

8 MR. MALINEN: Your Honor, we simply don't
9 know and this perhaps can be discussed momentarily when
10 we finish with the substantive issues here. But
11 Mr. Fitzgibbon and I also wish to raise, if Mr. Lyon
12 didn't, the fact that in this proceeding the
13 depositions had not been filed with the Secretary's
14 office in accordance with Section 1. Nor have the
15 witness fees been paid except one, some diminutive fee
16 of all the witnesses that have been brought here.

17 These are small pickings, yet they are
18 violations, and we'd like simply for our witnesses or
19 the people deposed, if not our witnesses, to be paid
20 and we'd like the deposition to be filed. And the
21 complaint made by Mr. Fitzgibbon that these things
22 should be on file, we shouldn't be receiving them weeks
23 after the deposition in a roundabout way.

24 JUDGE CHACHKIN: Well, when were they given?
25 When were the depositions given to them?

1 MR. LYON: I think it was the 24th of August.
2 Have you received your -- would Your Honor inquire as
3 to whether counsel for the Bureau had received their
4 copies of the deposition?

5 MR. MALINEN: Counsel -- the Bureau did not
6 order separate copies. We are referring to the rule
7 that requires filing as a matter of course.

8 JUDGE CHACHKIN: Well, they can't file it
9 until they get the signed deposition.

10 MR. MALINEN: And what we're saying is here
11 we've -- from what we -- our up-to-date research
12 indicates that he never even saw it and it's not
13 available to us and yet here it's showing up in their
14 case.

15 JUDGE CHACHKIN: Well, but the question is if
16 Mr. Morse has had it since August 21st, why hasn't he
17 signed it and sent it?

18 MR. FITZGIBBON: I spoke to him yesterday and
19 he has not received it yet.

20 JUDGE CHACHKIN: Oh, he hasn't received the
21 deposition yet?

22 MR. FITZGIBBON: That's correct.

23 MR. LYON: I don't understand why that would
24 occur. It's incumbent upon the court reporter to send
25 it.